TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~874~~ 80,

WILLIAM F. HOLTZMAN, PLAINTIFF IN ERROR,

vs.

WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, JAMES F. DOUGLAS, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED NOVEMBER 6, 1895.

(16,083.)

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(16,083.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 372.

WILLIAM F. HOLTZMAN, PLAINTIFF IN ERROR,

vs.

WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, JAMES F. DOUGLAS, ET AL.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 22, 1897.

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1 In the Court of Appeals of the District of Columbia.

WILLIAM F. HOLTZMAN, Appellant,
vs.
WILLIAM G. DOUGLAS *et al.* } No. 385.

In the Supreme Court of the District of Columbia.

WILLIAM F. HOLTZMAN, Plaintiff,
vs.
WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, James F. Douglas, William Howard Douglas, Ella Douglas, Catharine L. Wirt, and Mary E. Hughes, Defendants. } At Law. No. 29741.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Declaration. Filed May 31, 1889.

Declaration and notice to plead.

Filed May 31, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM F. HOLTZMAN, Plaintiff,
vs.
WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, James F. Douglas, William Howard Douglas, Ella Douglas, Catharine L. Wirt, and Mary E. Hughes, Defendants. } At Law. No. 29741.

The plaintiff sues the defendants to recover all of original lot numbered eight (8), in square numbered nine hundred and forty-one (941), in the city of Washington and District of Columbia, in which he claims the fee-simple and of which he was lawfully possessed on the 15th day of May, 1889, when the defendants entered the same and unlawfully ejected the plaintiff therefrom, and unjustly detain the same from the plaintiff; and the plaintiff
2 claims the possession of said original lot numbered eight (8), in said square numbered nine hundred and forty-one (941), in said city and District, with the appurtenances and the costs of this suit.

E. A. NEWMAN,
Pl'ff's Att'y.

Notice to Plead.

The defendants are to plead hereto on or before the first day of the first special term of the court occurring twenty (20) days after service hereof; otherwise judgment.

E. A. NEWMAN,
Pl'ff's Att'y.

Defendants' Pleas.

Filed July 3, 1889.

In the Supreme Court of the District of Columbia.

WM. F. HOLTZMAN
vs.
WM. G. DOUGLASS *et al.* } At Law. No. 29741.

1. For plea to the declaration each of the defendants say that they are not guilty as alleged.
2. And for further plea the defendants say that they are not jointly guilty as alleged.

L. CABELL WILLIAMSON,
Attorney for Defendants.

Joinder in Issue.

Filed July 15, 1889.

In the Supreme Court of the District of Columbia.

WILLIAM F. HOLTZMAN
vs.
WILLIAM G. DOUGLAS *et al.* } At Law. No. 29741.

The plaintiff joins issue upon the defendants' pleas.

E. A. NEWMAN,
Pl'ff's Att'y.

Memorandum.

1894, May 15.—Verdict for defendants.
" June 30.—Motion for new trial overruled and judgment on verdict.
" July 2.—Appeal by plaintiff.

3 In the Supreme Court of the District of Columbia.

WILLIAM F. HOLTZMAN *vs.* WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, James F. Douglas, William Howard Douglas, Ella Douglas, Catharine L. Wirt, and Mary E. Hughes.	At Law.	No. 29741.

The President of the United States to William G. Douglas, John F. Douglas, James F. Douglas, William Howard Douglas, Ella Douglas, Catharine L. Wirt, and Mary E. Hughes, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia on the 3 day of September, A. D. 1894, pursuant to an appeal filed in clerk's office of the supreme court of the District of Columbia on the 2d day of July, 1894, wherein William F. Holtzman is appellant and you are appellees, to show cause, if any there be, why the judgment rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 2 day of July, in the year of our Lord one thousand eight hundred and ninety-four.

Seal Supreme Court of the District of Columbia.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 13th day of July, 1894.

H. E. DAVIS &
EDWARDS & BARNARD,
Attorney- for Appellee.

[Endorsed:] (5.) No. 29741. Law. Wm. F. Holtzman *vs.* Wm. G. Douglas *et al.* Citation. Issued July 2, 1894. Service copy of the within citation acknowledged this 13th day of July, 1894. Edwards & Barnard, H. E. Davis, for def'ts. —— ——, marshal. A. A. Birney and E. A. Newman, attorneys for appellant.

Order Extending Time, etc.

Filed July 13, 1894.

In the Supreme Court of the District of Columbia.

WILLIAM F. HOLTZMAN *vs.* WILLIAM G. DOUGLAS *et al.*	At Law.	No. 29741.

It appearing to the court that it will be impracticable for the clerk to prepare and file the record, which is quite large, in this case

within the time prescribed by the rules, and for other special
4 and sufficient reasons now made known to the court, it is this 13th day of July, 1894, ordered that the time for producing and filing the transcript of the record in the above-entitled cause with the clerk of the Court of Appeals be, and the same is hereby, extended until the fifteenth day of October, 1894, and that the April term, 1894, of this court be, and the same is hereby, extended with that date, to wit, October 15th, 1894, for the purpose of settling and filing the bill of exceptions in this case and preparing and filing said transcript with said clerk of the Court of Appeals.

E. F. BINGHAM, *C. J.*

Plaintiff's Bill of Exceptions.

Filed October 6, 1894.

In the Supreme Court of the District of Columbia.

WILLIAM F. HOLTZMAN
vs.
JOHN F. DOUGLAS *et al.* } At Law. No. 29741.

Plaintiff's bill of exceptions.

Be it remembered that on the trial of this cause the plaintiff, to maintain the issue on his part joined, gave evidence to the jury tending to show that upon the division of lands in the city of Washington between the original proprietors and the United States the lot of land described in the declaration was allotted to the United States, and that afterwards, by divers conveyances and descents, the title thereto passed from said United States to one David A. Hall, who afterward died, December 24, 1870, and that the heirs-at-law of David A. Hall, by divers conveyances, conveyed said lot of land to the plaintiff in fee.

And further gave evidence tending to show that the defendants are and were at the institution of this suit in possession of said premises through one Richard Rothwell, their tenant under them, and claimed to own the same as heirs-at-law of William Douglas, who died in September, 1865.

And here the plaintiff rested.

And thereupon, to maintain the issue on their part joined, the defendants gave in evidence a deed of conveyance from the late corporation of the city of Washington, reciting a sale for unpaid taxes assessed in the names of David A. Hall for the year 186–, said deed being dated July 6, 1865, and duly recorded in the land records July 12, 1865; and said deed was admitted in evidence only to show color of title in the defendants.

Thereupon the defendants, further to maintain the issues on their part joined, called as a witness one JOHN F. DOUGLAS, who testified that he is a son of the said William Douglas, and knows the lot of land in question and has known Richard Rothwell since September

or October, 1867; that his mother was then paying taxes on
5 the lot, and not knowing where it was witness went and found it. Then he took his mother there (about a week later) to see Mr. Rothwell. She had some kind of an understanding with him. He has had possession ever since, and called at the house and settled whenever the rent was due. When witness went there with his mother in 1867 the lot was covered over with marble, belonging to Rothwell, who is a marble worker. It is a large lot. The lots adjoining were just similar to this lot, unimproved. There was then no pavement or anything like that. Witness wanted his mother to put up a fence, but Rothwell objected, and said he would go away if the fence were put up. At the time witness first went to the lot there was a shed on it similar to what marble men have to work under. Marble was scattered all over the lot. The people who owned adjoining property were at loggerheads with Rothwell, and would not let him put marble on their ground. Rothwell paid what he agreed to pay, but witness does not know the amount. There was no change in that situation until the death of witness' mother in 1887, and Rothwell still remains there, on terms not known to witness.

Cross-examined:

Cannot tell the first time he saw the lot: was so young he does not remember it. Witness was born in 1849. It was about a week or ten days after his finding the lot in 1867 that he went there with his mother and saw Rothwell. At his first visit he found Rothwell right on the lot working with his men. The lot fronts Massachusetts avenue and B street, between Ninth and Tenth streets northeast, and faces north; cannot say if there were any buildings back of this lot on East Capitol street, but thinks there were *some* on Ninth street and none on Tenth street or between this lot and Tenth street; cannot now say near what street was the shed spoken of, but knows there is a shed there, unless they have removed it recently. Rothwell also had a lot opening out on Ninth street, but witness does not remember seeing a shed upon it. The lot was first pointed out to witness at his first visit in 1867 by an old lady named Hamilton, who lived in the neighborhood and knew every inch of ground there, but witness did not survey the lot. Mr. Rothwell showed him the bounds. Rothwell's lot fronted on Ninth street and he had places to drive out on Massachusetts avenue; do not remember where Rothwell's office was; know that the shed was on this lot in suit because after showing him the deed Rothwell said so; do not know the dimensions of the lot or of Rothwell's Ninth Street lot or how far that lot runs back from Ninth street. When witness first saw the lot the marble was scattered over the whole lot; knows Rothwell's neighbors would not let him put stone on their lots because Mrs. Hamilton told him so. Rothwell did not say so, but just showed where his stone was. He just took the outlines of our lot and scattered it around. It was in big pieces—scattered—with places between where wagons could be driven to be loaded. Rothwell had no arrangement with witness' mother at that time.
6 She had never seen the lot. There were no pavements or side-

walks on the streets at that time and no improvements to indicate the lines of the streets.

Redirect:

Witness has been there lately. The property all around this lot is built up. Maybe they have torn down the shed, but to the best of his knowledge it is still there. Saw the stone strewn over the place. It is the same ground, only they have built up around and improved.

Recross:

Have seen the lot perhaps fifteen or twenty times in a year when driving out in the evenings; am by occupation a Pullman car conductor, and am in Washington very little. Whenever I was out there I would glance over it to see whether there was any improvements put upon it. This was the extent of my examination.

And CATHERINE L. WIRT, one of the defendants, a daughter of said William Douglass, being called as a witness testified:

My father died in September, 1865. I know at that time mother transacted all his business. My mother was administratrix of his estate. I think it was about 1867, I became aware that she was collecting rent for this lot in suit. I remember distinctly that my brother took my mother to see the lot. I did not go with them; have frequently seen Rothwell at mother's house. He paid her, as rent for the lot, the amount of the annual taxes, nothing more. After my father's death my mother paid the annual taxes. She filed the receipts as vouchers in the orphans' court. I have paid the taxes regularly since the death of my mother, in 1887. Since her death I have collected the rent from Mr. Rothwell. His possession has not been disturbed since the beginning. I have been out to the lot very often. It has been used as a stone-cutter's yard all these years; there is a shed upon it. The stones are scattered over the entire lot, I should judge. I have noticed this condition of things since mother's death, and before, too. I cannot state just exactly for how many years before my mother's death I saw the lot with the shed on it and the stones scattered over it, but I know it was quite a number of years before. I cannot possibly approximate the date when I first saw the lot in Mr. Rothwell's possession. I know it was not long after father's death. During all the time I have known the lot it has been occupied by Mr. Rothwell as a marble or stone cutting shop under the conditions I have described. The building adjoining this lot toward Ninth street was put up since my mother's death. Rothwell has two entrances to the lot, one on Ninth street and one on Massachusetts avenue. He owns no lot abutting on Massachusetts avenue. The stone is on the lot facing on Massachusetts avenue, and this has always been that way since my mother first located the lot.

Rothwell has paid no rent for the lot since this suit was
7 brought. He has remained in possession with our consent. I have collected the rents by agreement among the heirs of my father. The rent amounted only to the taxes.

Cross-examined:

I think the lot is laid out on the city plat fifty-nine feet, and either six or nine inches in width. I forget the depth. It is of irregular depth. It runs back from Massachusetts avenue toward East Capitol street, but does not extend to East Capitol street. I do not know anything of the other property occupied by Rothwell except that he had an exit on Ninth street. I cannot tell if he occupied another lot than this. I never took any account of my visits to this lot, and do not remember how many times I went there in the last year or the year before, or that I was there at all. I think I was there, but do not remember whether it was more than once. On that occasion I visited Mr. Rothwell at his residence, which is on Ninth street, opposite his stone yard. I have never been upon the stone yard but once. I cannot tell when that was. There was a shed upon the lot then. I cannot tell upon what part of the lot it was or when it was built. I have not been there within a year.

RICHARD ROTHWELL, being sworn as a witness, testified:

I live at No. 28 Ninth street N. E., and have been a builder and stone-cutter for fifty-six years. I was 72 years old last birthday. My present place of business is in square 1017, southeast Washington. Before I moved there my business was in square 941, opposite my house on Ninth street. I occupied a lot fronting on Massachusetts avenue and belonging to Mrs. Douglas. I bought some pontoons in the latter part of 1865 and put most of them on this lot and my own lot, and continued after I had some marble on it. I built a house right next to mine during the war and put the old marble and the pontoons on that lot. I had no agreement with Mr. Douglas about the lot, but in the latter part of 1867 I made a verbal agreement with Mrs. Douglas to pay her each year the amount of the taxes on the lot. This continued right along until there was something of a dispute about it and then I stopped paying. I paid to Mrs. Douglas during her lifetime and afterward to her daughter, Mrs. Wirt.

And the witness being asked the question, "How did you occupy that lot during all this time?" answered:

"I occupied it, to begin with, with my pontoons that I had on it, which I have stated I bought near the navy yard, and some marble that I left over in my place there, and I put stone on it; that was three years after, in 1870, when I put stone on it."

And further testified: There was no building on the lot then. I did not have a shed on the lot probably until 1874. It was a stone-cutter's shed about sixteen feet long. My working shed, when I first began to use this lot for stone, was on my own lot adjoining this lot. I just simply occupied the lot and paid the rent on
8 it, and put what stone I saw fit to put there and used it as I saw fit. I had my own shop on my lot, and run right across from one side to another. I used the two lots together. I could run from one to the other. This lot is in the rear of mine. Within

the last five years I have had a roadway cut to Massachusetts avenue, but before that I got out of the lot by driving through my lot to Ninth street. I heard of no claim to the lot until this suit.

When I made the arrangement with Mrs. Douglas she mentioned about fencing it, but I told her it would not suit me to fence it; it would not suit my business. I was in the stone business and wanted to get around with my wagons. There were no buildings on adjoining lots at that time except a small shanty on the west side; on the east side there were no houses. At the present time there is a brick house there. I think at the time I made the agreement with Mrs. Douglas the shanty was there.

And the witness was then asked the question, "Was this lot ever known in the neighborhood by any other name than the Douglas lot?" to which question counsel for the plaintiff objected on the grounds that it was incompetent to show that the lot was known by a particular name, and further that said question was leading; but the court overruled said objection and permitted the witness to answer the question; to which ruling counsel for the plaintiff then and there excepted, and the justice presiding noted the said exception upon his minutes; and the witness then answered to such question, "No, sir."

And the witness further testified: I do not recollect seeing Mr. John Douglas before he came to my place with his mother, but I do know the two came together about that time and had an arrangement about my paying rent for the lot. If anybody asked me who owned it, I said it belonged to Mrs. Douglas and I rented from her.

Cross-examined:

Before Mrs. Douglas came there I did not know who owned the lot. She said she owned it and I agreed to pay her the amount of the taxes each year. She paid the taxes. I put my pontoons on the lot several years before I saw Mrs. Douglas. I put them on the rear of the lot, right adjoining my lot. My lot on Ninth street runs to the rear of that lot and was covered pretty well with pontoons I bought near the navy yard in the latter part of 1865, as near as I can get at it. The pontoons covered a space on this lot in suit about as large as a quarter of the court-room. They were piled high. The pontoons remained quite awhile, the last of them being taken away in four or five years. They were there when I first saw Mrs. Douglas. I had some marble there that I had got from the Capitol that was left over from building my house during the war; there were probably three or four wagon-loads. It occupied a space about twenty feet square just adjoining my lot. It was a sort of overflow from my lot. I made no claim to this lot in suit. It never belonged to me. I had occupied it two years before I paid any rent—that is to say, I had the marble and pontoons on it in the way
9 I have described. I had not anything else on it. I got the marble for use in building a house, and the extra pieces I put on this lot and just let them lie there.

And the witness was then asked the following questions and gave the following answers:

Q. After that, when did you commence to use it for other stone? I understand by your examination-in-chief it was in 1870 when you began to put stone on it.

A. I put a lot of stone on it in 1870.

Q. That was the next stone you put on it after putting on the marble, was it not?

A. Yes, sir.

Q. From the time you put the marble on until 1870 you did not put any other stone there?

A. Very little, if any kind, after that.

Q. You have no recollection of any, have you?

A. I will tell you. My recollection is that in 1870 I had a contract with the Government for building the last twenty monuments that ever were built in the Congressional cemetery. In that case I had to get quite a quantity of stone, and the overflow of the stone that I bought I took it to these lots and put it on in 1870.

Q. That is the first stone you remember of putting on the lot after the marble you put there during the war?

A. Yes, sir; after the marble and the pontoons.

And said witness further testified:

The square to the east of this lot, towards Tenth street, was all open; there was nothing to indicate lot lines.

And being asked, "Did you not extend your pieces of stone and your pontoon piling over on some of the other lots?" answered: "Not after I found what belonged to Mrs. Douglas; I kept my stone on her lot because I didn't want another man to come and charge me rent for it. I kept most of my stone on her lot. Before that time I dropped it wherever it was convenient to do so."

And further testified: Before that time (1867) I didn't have much to drop anywhere. I kept a little store until 1865, when I gave it up.

I cannot fix the date when I first saw Mrs. Douglas, more than to say it was in the latter part of 1867. I say so because I had occupied the property about two years before anybody said anything to me about it. When she and her son came there I have no receipt or other paper to fix the time. She never gave me a receipt.

I know William F. Holtzman. He came to see me in April or May, 1889, and asked me how long I had been in occupation of the lot. I could not tell you what I told him. I told him just offhand. I don't remember that I had told him I had been there fifteen years. I might have said it. It was just a casual conversation, and I didn't know what he wanted or what he was driving at. After he questioned me I went to the navy yard, War Department, and Capitol and refreshed my memory.

10 I know Mr. Leo Simmons and furnished him some stone in 1890. I do not recollect talking with him in the fall of 1890 about this lot and telling him that I had been in occupation of it about fifteen years.

There was no shed on the lot until about 1874; then it was only a small shed to work in. It remained until I put up a big shed about twelve years ago. The big shed was removed about two years ago. There is a shanty on the lot and plenty of stone. I have paid no rent since 1889.

And defendants further gave evidence tending to prove that said lot of land was assessed for taxation in the name of William Douglas from 1866 to 1890, both inclusive, and that the annual taxes were paid by the widow and heirs of said William Douglas from 1868 to 1893, excepting 1870.

And here the defendants rested, this being the substance of all testimony given in their behalf.

And thereupon, and further to maintain the issue on his part joined, the plaintiff offered testimony in rebuttal tending to show that in the fall of the year 1889—between November, 1889, and February, 1890—said witness, Richard Rothwell, stated to one Leo Simmons that he had then been in occupation of the lot of land in suit for about fifteen years, and that in April or May, 1889, said Rothwell, in answer to inquiries made of him by the plaintiff, told the plaintiff that he had occupied said premises since the fall of 1874 and had held said premises under Mrs. Douglas only since that time.

And plaintiff offered further testimony tending to show that until the year 1874 the lot in suit was part of a common which included most of the square No. 941; that there was a walk or pathway across said lot and common running from the northeast to the southwest corner of the square, which was commonly used by the people of the neighborhood in traveling to and fro until four or five years ago. There were scattered blocks of stone upon different parts of the common all the way up from Ninth street, without regard to boundaries of lots. There was no enclosure or fencing about the lot or any building upon it. A shed was first built upon it in 1874.

The scattered stone first appeared on said lot about 1871 or 1872, and that said Richard Rothwell made no use of said lot until several years after that time, and that his business of stone-cutting was carried on prior to that time within his lot on Ninth street, which was fenced at the front and the rear.

And here the plaintiff rested in rebuttal; and the defendants, in surrebuttal, gave evidence tending to prove that there was no fence in the front of Richard Rothwell's Ninth Street lot, and that the same was only partially fenced on the line between said lot and the lot in suit, and that said fence was removed in 1876. A driveway was at all times kept open through the Ninth Street lot
11 to and upon the lot in suit, over and upon which the stone-wagons of Rothwell were driven to deposit what stone he had to deposit there and bring around. There was no pavement at all on Massachusetts avenue prior to 1876, and his wagons could drive from that avenue right over the commons.

And gave further evidence tending to show that the value of the land in suit is at least seven thousand dollars.

And here the defendants rested, and the foregoing was the substance of all the evidence given to the jury.

And thereupon the plaintiff, by his attorneys, requested the justice presiding to give to the jury the following instructions separately:

First. The jury are instructed that on the issues of adverse possession for the period of twenty years before suit brought the verdict must be for the plaintiff.

Second. If the jury find from the evidence that the witness Rothwell first became tenant to the defendants in 1867 by oral agreement to pay to them as annual rent the amount of taxes to be assessed thereon, and further find that after making such agreement he did not fence or otherwise enclose said premises or place material thereon prior to the year 1870, otherwise than by retaining upon it pontoons and stones placed there before he had any relations with the defendants, and when he claimed no right or title in said premises, then they are instructed that Rothwell's holding before such year 1870 is not to be regarded as an actual and visible possession adverse to the plaintiff and cannot defeat this action.

Third. The jury are instructed that in the absence of an adversary possession the possession is presumed in law to be in the person holding the title to the land, and one who enters upon and occupies the land of another claiming no right or title thereto may be considered as the tenant at will of the true owner, and he will remain such tenant and his holding will not be adverse until something happens which notifies the true owner that he ceases to hold as his tenant and holds adversely. Applying this rule to the case on trial, if the jury shall find from the evidence that more than twenty years before suit brought the witness Rothwell, claiming no title or right in the lot of land in question, entered thereon and deposited in the rear part thereof certain building materials, such entry must be taken to have been in subordination to the title of the true owner, and Rothwell must be considered to have been the tenant at will of such owner, and to change such tenancy into an adverse holding it was not enough that Rothwell attorned to Mrs. Douglas, and after such attornment suffered his materials aforesaid only to remain upon said lot as they were before such attornment, but he must have done some act on the land calculated to notify the true owner that he had ceased to hold as tenant to him and claimed in some other right.

But the justice presiding refused to give any of said instructions as the same were severally offered and rejected the same; to which refusal of each of said prayers for instructions the plaintiff then and there and before the jury retired to consider their verdict
12 separately excepted, and such several exceptions were by the justice presiding noted upon his minutes, and the justice presiding thereupon and at the request of the plaintiff gave the jury the following instructions:

"(2.)

To defeat the claim of the plaintiffs in this action upon the defence of adverse possession the jury must find from the evidence that the defendants, in person or by their tenants, have for more than twenty years prior to the 31st day of May, 1889, held actual, exclusive, continuous, open, notorious, and adverse possession of the said premises, and they cannot extend their possession by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises."

"(4.)

The jury are instructed that the defence of adverse possession is an affirmative defence, and that it is incumbent upon the defendants to establish such adverse possession by a clear preponderance of proof, and therefore, if the proof is equally balanced, they must find for the plaintiff."

And, at the request of the defendants, gave the following instructions:

"If the jury find from the evidence that William Douglas, the ancestor of the defendants, bought at a tax sale held by the late corporation of Washington, so called, the property in controversy in this case and paid the price bid by him at such sale and received from said corporation of Washington a deed to said property, which was by him duly filed for record and recorded in the land records of the District of Columbia more than twenty years prior to the commencement of this suit; that thereupon the said property was assessed to the said William Douglas on the tax books of the city of Washington and the taxes thereon from that time until the beginning of this suit paid by the said William Douglas or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented in behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangement with the defendants, and that, although the said property was not enclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy, deposited stone used by him in his business, and that such use and possession of the said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely, and uninterruptedly for a period of twenty years next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover."

And to the giving of said last-recited instruction the plaintiff, by his counsel, then and there duly excepted before the jury
13 retired to consider of their verdict, and the justice presiding noted said exceptions upon his minutes.

And the plaintiff thereupon prayed the court to sign and seal this his bill of exceptions, which is done, now for then, this sixth

day of October, 1894, and the same is made part of the record in this cause.

E. F. BINGHAM, *C. J.* [SEAL.]

Settled by consent.

A. A. BIRNEY,
Attorney for Plaintiff.
HENRY E. DAVIS,
Attorney for Defendant.

(Endorsed:) 29741. Orig. sent Mr. Davis Sept. 13, '94. A. A. B. To be use- in making record.

In the Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify that the foregoing pages, numbered from 1 to 21, inclusive, are true copies of the originals in cause No. 29741, at law, wherein William F. Holtzman is plaintiff and William G. Douglas, John F. Douglas, James F. Douglas, William Howard Douglas, Ella Douglas, Catharine L. Wirt, and Mary E. Hughes are defendants, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said supreme court, at the city of Washington, this 8th day of October, A. D. 1894.

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia supreme court. No. 385. William F. Holtzman, appellant, *vs.* William G. Douglas *et al.* Court of Appeals, District of Columbia. Filed Oct. 11, 1894. Robert Willett, clerk.

14 FRIDAY, *January 11th, A. D.* 1895.

WILLIAM F. HOLTZMAN, Appellant,
vs.
WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, JAMES F. DOUGLAS, WILLIAM HOWARD DOUGLAS, ELLA DOUGLAS, CATHERINE L. WIRT, and MARY E. HUGHES. } No. 385.

The argument in the above-entitled case was commenced by Mr. A. A. Birney, attorney for the appellant, and was continued by Messrs. Job Barnard and H. E. Davis, attorneys for the appellees.

MONDAY, *January 14th, A. D.* 1895.

WILLIAM F. HOLTZMAN, Appellant,
vs.
WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, JAMES F. DOUGLAS, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes. } No. 385.

The argument in the above-entitled cause was concluded by Mr. A. A. Birney, attorney for the appellant.

15 In the Court of Appeals of the District of Columbia.

WILLIAM F. HOLTZMAN, Appellant,
vs.
WILLIAM G. DOUGLAS *et al.*, Appellees. } No. 385.

It is hereby stipulated and agreed by and between the attorneys for the respective parties to this suit that William Douglas died in 1865, leaving surviving him his widow, Sophie E. Douglas, and as his heirs-at-law his six children, of whom four were adults and two were minors, one of them, namely, John F. Douglas, having been born June 11, 1849, and the other, Henry C., having been born August 18, 1857; that said Sophie E. was on May 12, 1866, appointed guardian of said two minor children, and that she claimed credit in her accounts in the supreme court of the District of Columbia, holding a special term for orphans' court business, as guardian of her said infant children, for the taxes paid on the said lot for a number of years, to wit, in her accounts filed for the years 1869, 1870, 1872, and 1874, for taxes for the years 1868, 1869, 1871, and 1872, and that the said credits were allowed to her in said accounts, as will appear from inspection of the accounts and vouchers in guardianship No. 1823, old series, on file in the office of the register of wills, and which tax receipts and vouchers were given in evidence on the trial of this cause.

A. A. BIRNEY,
Counsel for Plaintiff.
EDWARDS & BARNARD,
HENRY E. DAVIS,
Att'ys for Appellees.

(Endorsed:) No. 385. Holtzman, app't, *vs.* Douglas *et al.* Stipulation of counsel. Court of Appeals, District of Columbia. Filed Jan. 15, 1895. Robert Willett, clerk.

16 WILLIAM F. HOLTZMAN, Appellant,
vs.
WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, JAMES F. DOUGLAS, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes. } No. 385.

Opinion of Court by Mr. Justice Morris.

This is a suit in ejectment instituted in the supreme court of the District of Columbia on May 31, 1889, by the appellant, William F. Holtzman, as plaintiff, to recover from the appellees the possession of a lot of ground in the city of Washington, designated as lot 8, in square No. 941. The defense was adverse possession; and the jury returned a verdict for the defendants. From the judgment entered thereon the plaintiff has appealed.

At the trial, the plaintiff proved the record title to have been in one David A. Hall, who died on December 24, 1870, and the transmission of that title to himself by divers conveyances, which vested it in him in fee-simple. He also proved that the defendants, claiming as the heirs-at-law of one William Douglas, who died in September, 1865, were in possession by a tenant who held of them and paid them rent.

The testimony on behalf of the defendants showed what is known as a tax deed from the then existing corporation of the city of Washington to William Douglas, dated July 6, 1865, and recorded among the land records of the District on July 12, 1865, wherein it was recited that the property had been sold for unpaid taxes assessed on the land in the name of David A. Hall, its owner at the time. This deed was offered to show color of title in the defendants, and entry under such color of title. But in the brief time that elapsed between the execution of this deed and the death of William Douglas, it does not appear that the latter took any steps whatever to secure possession of the property.

It was testified on behalf of the defendants, that, some time in the latter part of the same year, 1865, one Richard Rothwell, a stone-cutter and builder, who owned and occupied an adjoining lot, deposited upon the rear of the lot in controversy some pontoons, which he had purchased from the United States, and which he stored here until he could make some disposition of them; and that he afterwards used a part of this lot for the deposit of stone and marble, which he used in his business. He testified that he had deposited three or four wagon-loads of marble there as early as the year 1867; and that some of the pontoons remained on the lot for four or five years. He also testified that, in the year 1870, he commenced to deposit stone there in large quantities; and that in 1872 he erected a small shed on the lot in which to carry on his work, and which he replaced with a larger structure in or about the year 1882.

Some time in the year 1867, Mrs. Douglas, the widow of William Douglas, apparently acting on behalf of his estate or of the estate of

their children, had an interview with Rothwell and came to an understanding with him with reference to his continued
17 occupancy of the lot, in pursuance of which understanding he agreed to pay as rent to her annually therefor a sum of money equal to the amount of taxes that should annually be assessed upon it; and he did so pay rent to her until her death in the year 1887; and after her death he paid the rent to her daughter, a Mrs. Wirt, down to about the time of the institution of this suit. During all this time, that is from 1867 to 1889, Rothwell continued to occupy the property, and paid rent therefor to the Douglases; and the latter paid the taxes annually for all the years from 1868 to 1893, both inclusive, except for the year 1870, during which there was an interregnum in consequence of the establishment about that time of a territorial form of government in the District of Columbia, the assessment of the property having been in the name of William Douglas since the year 1868 inclusive.

By a stipulation filed in the cause since the argument, in order to supplement some omission in the printed record, it appears that, at the death of William Douglas in 1865, four of his children were adults and two minors; and that Mrs. Douglas, the widow, was appointed guardian to the two latter, and filed in her guardianship accounts for several years the annual receipts for taxes on this lot paid by her, and was allowed credit for them by the court. It, therefore, appears that, with reference to this lot, she acted not for herself or on her own individual account, but on behalf of the estate that was then in her children.

There was a proposition on the part of Mrs. Douglas, apparently about the time of Rothwell's attornment to her, to inclose the lot with a fence. But to this Rothwell objected, on the ground that it would interfere with his use of it and with free access to it of his horses and wagons; and the project was abandoned, so that the lot was never actually inclosed, and the only evidences of occupation consisted in such use of the property as has been indicated. The streets had not been actually laid out in that neighborhood otherwise than by their delineation on the map of the city; and the whole region was an open field with no definite landmarks to indicate to the casual observer the actual location of this lot.

There was testimony on the part of the plaintiff in rebuttal, tending to show that Rothwell's actual occupation did not begin until about the year 1871, and even not until the year 1874.

Five instructions to the jury were requested on behalf of the plaintiff, two of which were given and three refused. On behalf of the defendants, one instruction was asked, which was given. Exceptions were duly reserved by the plaintiff. Exception was also taken by the plaintiff to the allowance of a question propounded to their own witness, Rothwell, by the counsel for the defendants, whether the lot in controversy had ever been known in the neighborhood by any other name than the Douglas lot. And upon these several exceptions three assignments of error are based, as follows: 1. That it was error to overrule the plaintiff's objection to the question asked of the witness Rothwell as to how the lot had been

known in the neighborhood. 2. That the testimony was insufficient to establish title in the defendants by adverse possession, and that therefore it was error to refuse the first and second prayer requested by the plaintiff in that regard. 3. That it was error to grant the prayer requested by the defendants, inasmuch as it assumed, as it is argued, that there was testimony to support it, whereas the plaintiff claims that there was no such testimony.

1. The first error assigned by the appellant is based upon a question propounded on the part of the appellees to their tenant, Richard Rothwell, who was called as a witness on their behalf. The question propounded was this: "Was this lot ever known in the neighborhood by any other name than the Douglas lot?" And the answer of the witness to it was, "No." Objection was interposed to the question on the ground that it was both irrelevant and leading—irrelevant, because it was not competent to show that the lot was known by any particular name.

Plainly, the question was leading, and for that reason properly subject to objection. It not only suggested the desired answer, but almost of necessity precluded any other answer; and it is an elementary rule of practice that a party should not be permitted to put leading questions to his own witness at the trial. But this is a rule that is subject to great modification; and it is always a matter more or less under the control and discretion of the trial court. That there are many circumstances under which a trial court will properly permit leading questions to be put by a party to his own witness, must of course, be conceded; for the exceptions to the rule are as elementary as the rule itself. And we are not advised
18 that a judgment has ever been reversed in any case on the sole ground that a question propounded by a party to his own witness, otherwise pertinent and proper, was of the nature of a leading question. The authorities seem to hold generally that the whole subject is within the discretion of the trial court, and that the mere allowance of a leading question should not be held in an appellate tribunal as reversible error. (*York v. Pease*, 2 Gray, 282; *Commonwealth v. Thrasher*, 11 Gray, 57; *Green v. Gould*, 3 Allen, 465; *Shufflin v. People*, 4 Hun, 16; *Regina v. Murphy*, 8 Carrington & Paine, 297) And this seems to be consonant with reason and sound principle; inasmuch as otherwise appeals might be greatly multiplied for mere matters of form to the detriment of the due administration of justice.

But it is argued that this question, to the allowance of which exception has been taken, was not only leading, but also incompetent and irrelevant, and the case of Ellicott *v.* Pearl, 10 Pet., 412, is cited in support of the position.

We cannot regard that case as applicable here. The question to which objection was made in that case and which was excluded and held to have been properly excluded, was as to what some surveyor, or person engaged with a surveyor, had on some occasion stated as to the place of the location of certain boundary lines. It was held that the boundary lines of a patent could not properly be established by hearsay testimony of that kind. But the issue in the case

before us is very different. It involved the notoriety of the possession by the appellees of the lot in dispute; and certainly it was competent to prove that notoriety by testimony as to the persons whom all the people in the neighborhood understood to be in the possession of the property. For the question is not as to whether the lot bore a specific name, but as to who were supposed to be the owners of it. That is the plain import of the question; and while it seems that the form of the question is a proper subject of criticism, it does not appear to us to be otherwise improper or irrelevant.

2. As already stated, the plaintiff submitted five prayers for instructions to the jury, two of which were granted and three refused. Those which were refused were as follows:

"1. The jury are instructed that on the issues of adverse possession for the period of twenty years before suit brought the verdict must be for the plaintiff."

"2. If the jury find from the evidence that the witness Rothwell first became tenant to the defendants in 1867, by oral agreement to pay to them as annual rent the amount of taxes to be assessed thereon, and further find that after making such agreement he did not fence or otherwise enclose said premises or place material thereon prior to the year 1870, otherwise than by retaining upon it pontoons and stones placed there before he had any relations with the defendants, and when he claimed no right or title in said premises, then they are instructed that Rothwell's holding before such year 1870 is not to be regarded as an actual and visible possession adverse to the plaintiff and cannot defeat this action."

"3. The jury are instructed that in the absence of an adversary possession the possession is presumed in law to be in the person holding the title to the land, and one who enters upon and occupies the land of another claiming no right or title thereto may be considered the tenant at will of the true owner, and he will remain such tenant and his holding will not be adverse until something happens which notifies the true owner that he ceases to hold as his tenant and holds adversely. Applying this rule to the case on trial, if the jury shall find from the evidence that more than twenty years before suit brought the witness Rothwell, claiming no title or right in the lot of land in question, entered thereon and deposited in the rear part thereof certain building materials, such entry must be taken to have been in subordination to the title of the true owner, and Rothwell must be considered to have been the tenant at will of such owner, and to change such tenancy into an adverse holding it was not enough that Rothwell attorned to Mrs. Douglas, and after such attornment suffered his materials aforesaid only to remain upon said lot as they were before such attornment, but he must have done some act on the land calculated to notify the true owner that he had ceased to hold as tenant to him and claimed in some other right."

The two instructions that were given at the request of the plaintiff were these:

"4. To defeat the claim of the plaintiff in this action upon the

defense of adverse possession the jury must find from the evidence that the defendants, in person or by their tenants, have for more than twenty years prior to the 31st day of May, 1889, held actual, exclusive, continuous, open, notorious, and adverse possession
19 of the said premises, and they cannot extend their possession by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises."

"5. The jury are instructed that the defense of adverse possession is an affirmative defense, and that it is incumbent upon the defendants to establish such adverse possession by a clear preponderance of proof, and therefore, if the proof is equally balanced, they must find for the plaintiff."

That the rule of law as to adverse possession of land was correctly laid down in these two instructions that were granted, and stated as favorably to the plaintiff as he could desire, cannot be doubted. They are in precise accord with the latest utterance of the Supreme Court of the United States on the subject in the case of *Ward v. Cochran* (150 U. S., 598), and with all the best authorities. But the substance of the appellant's argument is that there was no sufficient evidence to be submitted to the jury; and that therefore the other instructions which were requested, the practical effect of which would have been to take the case from the jury, should have been granted. It is urged that there is no evidence of any acts of adverse possession by the defendants prior to the year 1870; and it must be considered that, if this were the case, the plaintiff would have been entitled to the peremptory instruction which he sought.

The vice of the second and third instructions requested by the plaintiff lies in the fact that they seek to bind the defendants by the acts and claims of Rothwell, and not by their own acts and claims. If Rothwell had been the defendant in the suit and the claimant of the land for himself, the circumstances under which he first entered and his disclaimer of any claim of right or title in himself might be important as between him and the plaintiff. But his motives and purposes, and his actions in the premises, cannot reasonably be held to bind the defendants, except in so far as those actions are his actions as their tenant. If he had been put in possession for the first time by Mrs. Douglas, when she appears first to have entered upon the premises in 1867, it could not with any show of reason be claimed that his occupation from that time should not be regarded as adverse to the title of the plaintiff. Now, what difference could it make either to the rights of the appellant or to those of the appellee, that, at some previous time or for some previous period of time, this same Rothwell or any one else had also been an occupant of the land, and a trespasser upon it, so far as the title of the appellant was concerned. Certainly, because there has been one trespasser upon land, who perhaps did not intend to gain title to it by adverse possession, it does not follow that a subsequent occupant may not gain such title. It will scarcely be contended that, if the defendants had themselves entered in person in 1867, purchased the business and the material of Rothwell upon the premises, and con-

tinued that business precisely in the manner in which he continued to conduct it, they might not properly make that entry the basis of a claim of title by adverse possession. And if they could do so by entry in person, why might they not do it by the entry of a tenant for them? And if they could do it by a tenant, of what consequence would it be whether the tenant had ever had any connection with the land before. The possession thereafter, in contemplation of law, is not the possession of the tenant, but that of the person or persons under whom the tenant holds.

The theory that Rothwell, having occupied the land before 1867 without any claim of title, must be regarded as having held in subserviency to the title of the plaintiff as the true owner; and that thereafter no adverse title could accrue without notice of some kind to the true owner, is untenable, or at all events not applicable to the present case. Undoubtedly, one who has entered upon land as a tenant, or by the permission or grace of the owner of the land, cannot be allowed to disclaim the character of that entry and to hold adversely, until he does something whereby to notify the true owner of his changed relation to him. But an entry adverse in itself, and without the knowledge or consent, either express or implied, of the true owner, and continued occupation under such adverse entry, do not require the additional element of express intention on the part of the person who enters to form the basis of title by adverse possession. But whatever might have been the case with regard to the tenant Rothwell, we fail to see how the secret thoughts and purposes that may have actuated him in his original entry could be regarded as affecting the rights of the defendants in this case. His disclaimer of right might be held as a disclaimer with reference to the claim of title of the defendants with as much plausibility as it could be held to operate in favor of the title now held by the plaintiff.

20 There was, however, it is argued, no actual inclosure of the land by the defendants or their tenant such as to put the appellant upon notice of the adverse occupation; and numerous cases are cited by the appellant to show what acts of use or occupation of property would be insufficient as a basis for a claim of title by adverse possession. But we fail to see how these cases are applicable. It is well-settled law that, for the purposes of a title by adverse possession, actual inclosure is not necessary, and that any occupation of the property, visible and notorious, of which the property is susceptible, and which excludes the true owner from it is sufficient. (*Ellicott v. Pearl*, 10 Pet., 412; *Ewing v. Burnett*, 11 Pet., 41.) And, short of an actual inclosure, it is not easy to conceive of a use and occupation more sharply distinctive and adverse than the conversion of the property into a stone yard, with the stone practically scattered all over it, according to the testimony of one or more of the witnesses.

Nor should the fact be ignored in this connection, that for upwards of twenty years the record owners of this property wholly neglected their duties to the public in regard to it, never sought to pay the taxes, and permitted the defendant to discharge the burden

which it was incumbent upon themselves to bear, and it might well be supposed that they had abandoned the property and acquiesced in the title which the defendants had acquired. In the case of *Ewing v. Burnett* (11 Pet., 41, 54), the Supreme Court of the United States said that "the uninterrupted payment of taxes on the lot for twenty-four successive years (by the party in possession) was *powerful* evidence of a claim of right to the whole lot." And we are disposed to hold, in accordance with that view, that there was ample evidence in this case to go to the jury to show the claim of the defendants and the nature and extent of it from the year 1867.

3. An assignment of error is also based upon an instruction given by the court to the jury on behalf of the appellees, which was as follows:

"If the jury find from the evidence that William Douglas, the ancestor of the defendants, bought at a tax sale held by the late corporation of Washington, so called, the property in controversy in this case and paid the price bid for it by him at such sale and received from said corporation of Washington a deed to said property, which was by him duly filed for record and recorded in the land records of the District of Columbia more than twenty years prior to the commencement of this suit; that thereupon the said property was assessed to the said William Douglas on the tax books of the city of Washington, and the taxes thereon from that time until the beginning of this suit paid by the said William Douglas or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented on behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangements with the defendants; and that, although the said property was not enclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy, deposited stone used by him in his business, and that such use and possession of said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely, and uninterruptedly for a period of twenty years next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover."

It is argued on behalf of the appellant that there was no evidence of the facts assumed in this instruction; that there was no evidence to show that Rothwell had taken possession of the property for the purposes of a stone yard, or that, after his attornment to Mrs. Douglas, he had placed any stone upon the lot prior to 1870. But this contention resolves itself into a dispute about words. Both in law and in fact it must be held that the continuance of possession under a new arrangement is the equivalent of taking possession under such arrangement; and the keeping upon the premises of stone previously deposited there must be regarded as the equivalent of depositing stone upon the land. We cannot think that the jury were misled by the expressions used in the instruction; and the instruction otherwise is not regarded as liable to objection or criticism.

Certainly it has not omitted any of the elements that are required to co-operate to constitute title by adverse possession.

While as to the early years of the occupation in this case, the evidence of acts of use and possession is somewhat meager, and those acts themselves might be regarded as rather indefinite, we cannot say, as matter of law, that there was nothing to go to the
21 jury with reference to occupation prior to 1870. We think there was sufficient evidence as to such occupation to be submitted to the jury; and it seems to us that the case was fairly and properly submitted to them upon the law. We are unwilling to disturb their verdict.

It is our opinion, therefore, that the judgment of the court below should be affirmed, with costs; and it is so ordered.

22 MONDAY, *March 4th, A. D.* 1895.

* * * * * * *

WILLIAM F. HOLTZMAN, Appellant, *vs.* WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, James F. Douglas, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes.	No. 385.	January Term, 1895.

Appeal from the supreme court of the District of Columbia.

This cause came on to be heard on the transcript of record from the supreme court of the District of Columbia, and was argued by counsel; on consideration whereof it is now here ordered and adjudged by this court that the judgment of the said supreme court in this cause be, and the same is hereby, affirmed with costs.

Per MR. JUSTICE MORRIS.

March 4, 1895.

23 WEDNESDAY, *October* 16, *A. D.* 1895.

* * * * * * *

WILLIAM F. HOLTZMAN, Appellant, *vs.* WILLIAM G. DOUGLAS, JOHN F. DOUGLAS, JAMES F. Douglas, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes.	No. 385.

On motion of Mr. A. A. Birney, attorney for the appellant in the above-entitled cause, it is ordered by the court that a writ of error to remove said cause to the Supreme Court of the United States be, and the same is hereby, allowed on giving bond in the sum of three hundred dollars.

24 Know all men by these presents that we, William F. Holtzman, as principal, and Aylett T. Holtzman, as surety, are held and firmly bound unto William G. Douglas, John F. Douglas, James F. Douglas, William Howard Douglas, Ella Douglas, Cath-

erine L. Wirt, and Mary E. Hughes in the full and just sum of three hundred dollars, to be paid to the said William G. Douglas, John F. Douglas, James F. Douglas, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes, — certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 19th day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Whereas lately, at a Court of Appeals of the District of Columbia, in a suit depending in said court between William F. Holtzman, appellant, and said William G. Douglas, John F. Douglas, James F. Douglas, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes, a judgment was rendered against the said William F. Holtzman, and the said William F. Holtzman having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said William G. Douglas, John F. Douglas, James F. Douglas, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes, citing and admonishing them to be and appear at a Supreme Court of the United States, to be holden at Washington, within 30 days from the date thereof:

Now, the condition of the above obligation is such that if the said William F. Holtzman shall prosecute said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

WILLIAM F. HOLTZMAN. [SEAL.]
AYLETT T. HOLTZMAN. [SEAL.]

Sealed and delivered in the presence of—
A. A. BIRNEY.

Approved by—
R. H. ALVEY, *Ch. Justice.*

[Endorsed:] No. 385. William F. Holtzman, appellant, *vs.* William G. Douglas *et al.* Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Oct. 21, 1895. Robert Willett, clerk.

25 UNITED STATES OF AMERICA, *ss:*

To William G. Douglas, John F. Douglas, James F. Douglas, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein William F. Holtzman is plaintiff in error and you are defendants

in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Richard H. Alvey, Chief Justice of the Court of Appeals of the District of Columbia, this 21st day of October, in the year of our Lord one thousand eight hundred and ninety-five.

R. H. ALVEY,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted Oct. 21, 1895.

EDWARDS & BARNARD, *Att'ys.*
HENRY E. DAVIS, *For Certain Appellees.*

[Endorsed:] Court of Appeals, District of Columbia. Filed Oct. 21, 1895. Robert Willett, clerk.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you or some of you, between William F. Holtzman, appellant, and William G. Douglas, John F. Douglas, James F. Douglas, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes, appellees, a manifest error hath happened, to the great damage of the said appellant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 21st day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Seal Court of Appeals, District of Columbia.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

27 Court of Appeals of the District of Columbia.

I, Robert Willett, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages, numbered from 1 to 26, inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of William F. Holtzman, appellant, *vs.* William G. Douglas, John F. Douglas, James F. Douglas, William Howard Douglas, Ella Douglas, Catherine L. Wirt, and Mary E. Hughes, No. 385, January term, 1895, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 1st day of November, A. D. 1895.

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: Case No. 16,083. District of Columbia Court of Appeals. Term No., 372. William F. Holtzman, plaintiff in error, *vs.* William G. Douglas, John F. Douglas, James F. Douglas, *et al.* Filed November 6th, 1895.

No. 80.

Brief of Birney for P. C.

Filed Oct. 1, 1897.

JAMES H. McKEN... CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1897.

No. 80.

WILLIAM F. HOLTZMAN, PLAINTIFF IN ERROR,

vs.

WILLIAM G. DOUGLAS ET AL.

BRIEF FOR PLAINTIFF IN ERROR.

ARTHUR A. BIRNEY,
Attorney for Appellant.

LAW REPORTER PRINT.

In the Supreme Court of the United States

OCTOBER TERM, 1897.

No. 80.

WILLIAM F. HOLTZMAN, PLAINTIFF IN ERROR,

vs.

WILLIAM G. DOUGLAS ET AL.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error, who was the plaintiff below, filed his declaration in ejectment May 31, 1889, to recover a lot of land in the city of Washington. The pleas were not guilty and were not jointly guilty. .

At the trial plaintiff proved a regular title in fee in himself deraigned by various conveyances and descents from the United States, and the possession of defendants through their tenant William Rothwell.

The defendants claimed title by adverse possession founded upon a tax deed dated July 6, 1865, made to William Douglas, whose heirs at law they are.

No proof was tendered to show the validity of the deed, and it was admitted only as tending to show color of title (4).

The testimony to show adverse possession made the following case:

In 1865 Richard Rothwell was owner of a lot abutting at

the rear of the lot in suit. He claimed no right in, or title to, the lot in suit and did not know who was the owner thereof. In the latter part of 1865, Rothwell purchased some old pontoons and marble which he placed on his lot and on the lot in suit.

The pontoons covered a space about one-fourth the size of the court room (8) and the marble a space about twenty feet square just adjoining Rothwell's lot (8). It "was a sort of overflow" from his lot. *He made no further use of the lot until 1870*, when he put upon it some other stone he had bought from which to make monuments (9). There was no building on the lot before 1874, and there was no fence about it at any time.

In September or October, 1867, Mrs. Douglas, widow of William and mother of the defendants, visited Rothwell and told him she owned the lot. He then orally agreed to pay her as rent the amount of the yearly taxes, and did so pay until the bringing of this suit. She paid the taxes to the government. In 1887 Mrs. Douglas died, and Rothwell after that recognized the defendants as her successors and paid rent to them. At the time of the arrangement with Mrs. Douglas in 1867, there were no buildings on adjoining lots except a small shanty on the west side. The lot was part of a commons where there were no fences, and no houses.

Plaintiff on rebuttal proved that the first scattered stone appeared on the lot in 1871 or 1872, and that there were scattered blocks on different parts of the commons without regard to boundaries of lots, and that Rothwell's lot was fenced at the back.

One exception was taken in the course of the testimony. The other exceptions were to the refusal of prayers for instructions by the plaintiff and the granting of prayers asked by defendants.

ASSIGNMENT OF ERRORS.

1. The court erred in overruling the objection of the plaintiff to the question asked the witness Rothwell and set out on page 8 of the Record.

2. The court erred in holding that the testimony for the defendants tended to establish title in them by adverse possession for twenty years before suit, and in refusing the first, second and third prayers of the plaintiff upon this subject.

3. The court erred in rejecting the second prayer of the plaintiff.

4. The court erred in rejecting plaintiff's third prayer.

5. The court erred in granting the prayer of the defendants recited in the record.

ARGUMENT.

The first exception was the overruling of the objection to the question asked the witness Rothwell (8). There having been no testimony that the lot was known by any particular name the witness was asked:

"Was this lot ever known in the neighborhood by any other name than the Douglas lot?" Objected to as incompetent and as leading. Objection being overruled and an exception noted the witness answered, "No, sir."

The question assumed that the lot had an established designation (as to which there was no evidence) and clearly suggested to the very willing witness the answer desired of him. If it is error to ask a leading question of such a witness then there was error here.

But the evidence that the lot was known as "the Douglas lot" was inadmissible for any purpose. It was hearsay and did not come within any of the recognized exceptions to the rule excluding hearsay testimony. Hearsay is admissible in cases of pedigree and in cases of prescriptive

rights and customs and other claims of a public nature. "They are all cases of general right, affecting a number of persons having a common interest."

The question is fully covered by the ruling and opinion of this court in Ellicott *vs.* Pearl, 10 Peters, 412, 434.

The Acts of Alleged Adverse Possession.

This suit was brought May 31, 1889. The vital question for the jury was, *Were the defendants in adverse possession prior to May 31, 1869?* Our contention is that there was no evidence to sustain the claim of adverse occupancy prior to 1870 at the best, and that the jury should have been so instructed.

The facts attempted to be proved were, that in 1865 Rothwell, *claiming no right whatever* in the lot, deposited upon it some blocks of marble and some pontoons. He had nothing else upon it (8) and himself testified:

> "I got the marble for use in building a house and the extra pieces I put on this lot, and just let them lie there" (8).

He did no further act upon the ground until 1870, but in 1869 he entered into an oral agreement with Mrs. Douglas, *known only to themselves*, that he would pay each year to her the amount of the taxes to be assessed.

The lot was not fenced or built upon in any way, and there was no indication of occupancy by any one, except for the presence of the marble and pontoons placed there in 1865. (Rothwell, test. 9).

Allowing every proper and natural inference to be drawn from the evidence, we insist that at least until 1870, and perhaps until 1874, *there was no act upon which title by adverse possession can be based.*

The second rejected prayer for instruction asked the court to rule that the mere retention upon the land by Rothwell, after his alleged secret attornment to Mrs. Douglas in 1867, of the

scattered stones placed there by him as a trespasser before that time, was not evidence of an actual and visible possession adverse to the plaintiff's grantors; and the third prayer took the ground that Rothwell's occupancy prior to such attornment in 1867 was as that of a tenant at will of the owner (the grantor of plaintiff in error), and that, to commence a holding of different and adverse character, there must be shown some act—

> "CALCULATED TO NOTIFY THE OWNER THAT HE HAD CEASED TO HOLD AS TENANT TO HIM AND CLAIMED IN SOME OTHER RIGHT."

It is submitted that both prayers were sound and should have been granted.

No Hostile Entry.

Nothing is better settled than that an entry upon land to be "adverse" must be in hostility to the true owner and under claim of title. When was the first ACT of hostility to the title of the plaintiff's grantors? To support the defense it must have been prior to May 31, 1869, but the only *act upon the land*, or entry before that time, which the testimony tended to show, was in 1865, when Rothwell, *claiming no title*, placed upon it the pontoons and marble which were suffered to remain.

But since he claimed no title the act not only was not in hostility to the owner, or adverse, but must be held to have been *a holding under that owner.*

This court has said:

> "Anyone in possession, with no claim to the land whatever, must, in presumption of law, be in possession in amity with and in subservience to that title."
>
> Harvey *vs.* Tyler, 2 Wallace, 328, 349.
>
> Tyler on Ejectment, pp. 860, 861.

The Attornment to Mrs. Douglas.

The only other act prior to 1870 upon which to base the claim of title by possession is the attornment to Mrs. Douglas in October, 1867. *This was a secret agreement not of a character to become known to the true owners,* or to other persons, and for this reason insufficient.

This court, in its latest decision upon this subject, says:

> "The possession must be actual and exclusive, adverse and hostile, *visible and notorious,* continued and uninterrupted."
>
> Wood *vs.* Cochran, 150 U. S. 598, 601.

So in Illinois the court said:

> "An occupation of land to be adverse must be such as to inform the neighborhood of its exclusive appropriation."
>
> Brook *vs.* Bruyn, 18 Ill. 539.

A case in Georgia is in point. The court said:

> "Therefore we think if B entered as a 'squatter' —entered disclaiming title—he was to be considered as holding the possession as tenant at will of the true owner, and as remaining such tenant *until something happened which might serve to notify the true owner that* B had ceased to hold as such tenant and was holding adversely to him. What this something would have to be we do not undertake to specify We think, however, it would have to be somewhat more than a private attornment of the tenant to another claimant of the land. He who has the title to land is deemed to be in the seizen and possession of it, and to continue so until ousted thereof by an actual possession in another under a claim of right. The possession of one who enters disclaiming title is to be considered as a possession by the consent of him who has the title; nor will a continuance of this possession avail to mature a title under the Statute of Limitations until the character of the possession

has been changed, *either by a declaration to that effect communicated to him who has the title, or by the exercise of acts of ownership* inconsistent with a tenancy by the consent of him who has the title."

Stamper et al. *vs.* Griffin, 20 Ga. 312.
Gay *vs.* Mitchell, 35 Ga. 139.

This doctrine thus clearly stated by the Georgia court is only a specific application to the facts before the court of the law as declared by this court in the case in 150 U. S., already cited.

The acts of Rothwell in 1865, in putting stone and material on the land, having been done as tenant at will of plaintiff's grantors, and in subservience to their title, surely a secret agreement of attornment, not brought to their notice, cannot be held to have terminated that tenancy, and to constitute that "adverse and hostile, visible and notorious" entry or conduct upon which defendants must rely to defeat the plaintiff's right of entry.

The first, second and third prayers should all have been granted on this ground alone.

II.

On another ground the first prayer for the plaintiff should have been granted, and the prayer granted to the defendant should have been rejected.

THERE WAS NO EVIDENCE OF ACTS OF OWNERSHIP by the defendants or their witness Rothwell sufficient to support the claim of adverse possession.

What appears is that Rothwell in 1865 allowed some marble and pontoons to "overflow" from his own adjacent land upon *a small part* of the lot in suit, and there it remained undisturbed until within twenty years.

The lot was not fenced; it was a part of a large common and its bounds were not defined; it was not cultivated; there was no building upon it, *and the only sign of occupancy or*

possession was a pile of pontoons covering a space "about as large as a quarter of the court room," and some marble occupying "a space about twenty feet square just adjoining" Rothwell's lot (8).

This was not "exclusive" occupancy, for all the rest of the lot was open and free to all users. Such occupancy in no case *could* affect more than the small spaces covered by the materials.

> "A possession not actual but constructive; not *exclusive but in participation* with the owner or others falls very far short of the kind of adverse possession which deprives the owner of his title."
>
> Ward *vs.* Cochran, 150 U. S. 608.

The placing of the pontoons and marble on the ground as an "overflow" from a large pile upon Rothwell's ground was not an indication of claim of ownership or dominion. It was an indecisive act entirely consistent with submission to the true owner's title, and not the foundation of adverse possession.

Having a woodpile on the land is not sufficient.

Miller *vs.* Downing, 54 N. Y. 631.

Erection of cowpen, ranging cattle and occasionally felling trees not sufficient.

Royal *vs.* The Lessee of Lisle et al., 15 Ga. 545.

To dig sand on and from the land from time to time and sell the same are but mere trespasses.

Parker *vs.* Wallis, 60 Md. 15.

Occupying a sugar place from year to year for the purpose of making sugar not sufficient.

Wilson *vs.* Blake, 53 Vt. 305.

Going upon wild land, digging and hunting for a corner and boundary lines, driving cattle on the land, and employ-

ing a man to break it in the following spring, are not such going into possession as will set the Statute of Limitations in operation.

Brown *vs.* Rose, 55 Iowa, 734.

Turning cattle on uninclosed land to pasture not sufficient.

Doe on the demise of Andrews *vs.* Mulford, 1 Hayes, 311.

Making an entry upon lands, cutting wood and splitting rails not sufficient.

Carroll et al. *vs.* Gillion, 33 Ga. 539.

There was nothing to indicate the bounds of possession. It is true that a fence is not necessary in all cases to constitute adverse possession (Ellicott *vs.* Pearl, 10 Pet. —; Ewing *vs.* Burnett, 11 Pet. 41); but the jury in such case must be satisfied "*that the property was not susceptible of any more strict and definite possession* than has been taken."

Ewing *vs.* Burnett, at p. 53.

In Ellicott *vs.* Pearl the tract of land was so large that to fence it was impracticable, and the defendant had actually entered and built houses upon a part of the land, having color of title to the whole. The case illustrates a class of cases differing widely from that at bar.

In Ewing *vs.* Burnett the court says that by reason of the steep declivity and gulleys a fence could only have been placed a short distance on one side of the lot, and the acts of ownership proven were all that, under the conditions, could be done to indicate possession and claim.

In this case there was no good reason why the lot should not have been enclosed, or some sign given to indicate that it was held under claim of right.

Sharon *vs.* Tucker, 144 U. S. 533.

The possession of Rothwell at any time prior to 1874 was "not actual, but constructive."

III.

The prayer granted defendant assumed that there was evidence of facts as to which there was no evidence.

It told the jury that they are at liberty to find that Rothwell took possession for the purpose of a stone yard, and deposited thereon stone used by him in his business continuously, openly, adversely and uninterruptedly for a period of twenty years before the suit, and if so the plaintiff could not recover.

There was no testimony at all tending to prove these facts. Rothwell did not take possession for the purposes of a stone yard, did not deposit upon it stone used in his business, and himself testified that after attorning to Mrs. Douglas he put no stone whatever upon the lot until 1870.

There was nothing therefore in the evidence to justify this instruction.

It is submitted that the instructions prayed by the plaintiff should have been given, and the instruction given the defendant should have been rejected.

The judgment should be reversed.

ARTHUR A. BIRNEY,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 24.

WILLIAM P. BOUTEMAN, Appellant,

vs.

WILLIAM O. DOUGLAS ET AL., Appellees.

BRIEF ON BEHALF OF APPELLEES.

HENRY E. DAVIS,
JAMES S. EDWARDS,
JOB BARNARD,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 80.

WILLIAM F. HOLTZMAN, APPELLANT,

vs.

WILLIAM G. DOUGLAS ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLEES.

This is an action of ejectment for lot 8, square 941, in Washington City, brought in 1889, by the appellant, and defended by the appellees, they claiming title by adverse possession.

The lot formerly belonged to David A. Hall, who died in 1870, and thereafter his heirs conveyed to the appellant. The taxes were not paid by Hall, and the lot was sold by the city of Washington at tax sale, and a deed made to William Douglas, the purchaser, 1865 (p. 4). Mr. Douglas recorded his deed July 12, 1865, and died in September of the same year.

The appellees are his heirs at law, and they took possession of the said lot by making a contract of letting to Richard Rothwell, who had already used the lot to store some old pontoons and marble upon it, but without any agreement of lease with any one until 1867. Thereafter

the said Rothwell paid rent for the said lot (p. 7) to the appellees and they paid the taxes (pp. 8, 10, 14).

POINTS.

I.

As to the first alleged error of the court, in allowing an answer to a leading question, we submit that such matter is always in the discretion of the trial court, and the rulings thereon do not constitute such error as will be reviewed by an appellate court, or such as would cause a reversal of the judgment.

Regina *vs.* Murphy, 8 Carrington & Payne, 297.
York *vs.* Pease, 2 Gray, 282.
Commonwealth *vs.* Thrasher, 11 Gray, 57.
Green *vs.* Gould, 3 Allen, 465.

It is also claimed by appellant that this question was improperly allowed, because it called for hearsay evidence.

It was proper to prove *notoriety* of ownership as well as of possession, and such *notoriety* could be proved by showing what was heard by the witness in the neighborhood. It is not admitted as proving, or tending to prove, the truth of the alleged hearsay statement; but the fact that there was such statement—that the lot had a popular designation; was reputed to belong to Douglas; or was known as the "Douglas lot."

II.

The other four errors assigned may be considered together, for they all raise questions of alleged error in the giving or refusing of instructions to the jury; and it is claimed by the appellants that the rulings were not justified by the evidence.

There is no dispute that the tax deed to Douglas in 1865 was recorded, and that under it he had ostensibly the record title; certainly color of title.

In the absence of proof, Rothwell's possession may properly be presumed to have been under his (Douglas') title. It could only have been *presumed* to be under Hall's title, in any event; and such *presumption* would give way before actual proof to the contrary. That actual proof is found in Rothwell's testimony. He declares he had no lease, or contract of entry, from any one until he made the contract with Mrs. Douglas in 1867. There is no doubt about that contract, no contradiction; neither is there any doubt that Mrs. Douglas acted in this matter for her children, the appellees and heirs. She charged a portion of the taxes paid to them in her guardian accounts (p. 14).

Now, the inquiry which it seems needful for the court to make is this: Was there sufficient evidence of adverse possession by appellees for a period of twenty years, or more, o warrant the trial court in submitting that question to the Jury; and, if so, was the evidence sufficient to support the verdict which found such adverse possession to be proven?

The Douglas title, as shown by the Records, should not be lost sight of in considering the character and extent of the possession.

The reason of the rule which requires proof of actual occupation of land in order to create title by possession is this, that notice may be thus given to the owner of an adverse claim of title.

In the present case, the land records, and also the records in the tax collector's office, give notice of such adverse claim of title, as well as the visible occupation, and open use of the lot for storage, and stone-cutter's work.

A constructive possession of a part of a tract of ground may constitute *adverse* possession of the whole tract, when the possessor has color of title to the whole, and is in actual possession of a portion thereof.

> Tyler on Ejectment and Adverse Possession, 895.
> Ellicott *vs.* Pearl, 10 Peters, 412, 442.

Where one enters into possession under claim of title by

recorded deed, his entry and possession are referred to such title, and he is deemed to have *seisin* of the land co-extensive with the boundaries stated in his deed, if there is no one else in open adverse possession of any other portion of it.

Buswell on Lim. and Adv. Possession, Secs. 254, 255.
Prescott *vs.* Nevers, 4 Mason (C. C.), 326.

The presumption is that a party in possession under a recorded deed, is claiming adversely, and according to his title.

Forrest *vs.* Jackson, 56 New Hampshire, 357.
Wicks *vs.* Lake, 25 Wisconsin, 71.

An *owner* of ground cannot be excused for ignorance of the particular claim of right under which the premises were held by those in possession. He is not in the position of a casual observer, but must diligently look to his own interests, know the boundaries of his land, and ascertain the extent, meaning and locality of any settlement made within his lines without his authority.

Brownson *vs.* Scanlan, 59 Texas, 226.
Bracken *vs.* Jones, 63 Texas, 184, 187.

The recorded deed, and the open and notorious possession and use of the lot, were sufficient to give notice to the world of a claim of right to the lot in question; but the continued payment of the taxes was "*powerful evidence*" also of such claim, as this court has said in the case of—

Ellicott *vs.* Pearl, 10 Peters. 442, and in—
Fletcher *vs.* Fuller, 120 U. S. 534, 553.

The use of a vacant lot, openly, continuously, and exclusively, is equivalent to an enclosure of the same, or the erection of buildings thereon.

It is but another method of notifying the world that the

party is claiming the right of ownership—that his "flag" is planted there and kept flying over that ground.

Ewing *vs.* Burnet, 11 Peters, 49–51.

A careful analysis of the facts will show that the case of Stamper *vs.* Griffin, 20 Georgia, 312, cited on appellant's brief, is not applicable to this case.

Neither is the case of Ward *vs.* Cochran, 150 U. S. 597, for there the possession, which was so definitely characterized and which ripened into title, was a possession under a parol arrangement, and no color of title was upon the record.

The five elements necessary to constitute title by possession are clearly stated, and the proper qualification given to the word "actual" as distinguished from "constructive" when applied to the possession, in the recent case of Bradshaw *vs.* Scott, decided by the Court of Appeals of the District of Columbia, and reported in 4 D. C. Appeals, 527.

Tested by the rule there laid down, the instruction granted by the court below on behalf of defendants is correct.

The instruction granted for plaintiff (marked 2, page 12) gives him the benefit of the theory on which the rejected prayers were based, so far as he was entitled to any benefit therefrom.

We call attention to the opinion of Justice Morris, beginning on page 15 of the Record, and reported in 5 D. C. Appeals, and ask its careful consideration by the court.

There was evidence from which the jury could fairly find a verdict in favor of the defendants; and the instructions granted by the trial court properly left the question of adverse possession to them; and we therefore claim that there is no substantial error shown by the Record in this case, and that the judgment should be affirmed.

HENRY E. DAVIS,
JAMES S. EDWARDS,
JOB BARNARD,
Attorneys for Appellees.

HOLTZMAN *v.* DOUGLAS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

No. 80. Argued November 1, 1897. — Decided November 29, 1897.

This was an action of ejectment. The plaintiff claimed under one Hall, former owner of the land. The defendants claimed under one Douglas, who bought it at a tax sale in 1865. The defendants set up adverse possession in defence. The court instructed the jury that to defeat the claim of the plaintiffs upon the defence of adverse possession the jury must find from the evidence that the defendants, in person or by their tenants, have for more than twenty years prior to the 31st day of May, 1889, held actual, exclusive, continuous, open, notorious and adverse possession of the said premises, and they cannot extend their possession

Opinion of the Court.

by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises; and, on the request of the defendants, that "if the jury find from the evidence that William Douglas, the ancestor of the defendants, bought at a tax sale held by the late corporation of Washington, so called, the property in controversy in this case and paid the price bid for it by him at such sale and received from the corporation of Washington a deed to said property, which was by him duly filed for record and recorded in the land records of the District of Columbia more than twenty years prior to the commencement of this suit; that thereupon the said property was assessed to the said William Douglas on the tax books of the city of Washington, and the taxes thereon from that time until the beginning of this suit paid by the said William Douglas or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented on behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangements with the defendants, and that, although the said property was not inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy, deposited stone used by him in his business, and that such use and possession of said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely and uninterruptedly for a period of twenty years next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover." *Held*, that the instructions as given were substantially correct, and there was evidence in the case upon which to found the one given at defendants' request.

The case is stated in the opinion.

Mr. Arthur A. Birney for appellant.

Mr. Job Barnard for appellees. *Mr. Henry E. Davis* and *Mr. James S. Edwards* were on his brief.

Mr. Justice Peckham delivered the opinion of the court.

This is an action of ejectment, brought to recover the possession of a lot in the city of Washington, designated as lot No. 8 in square No. 941. The defendants set up adverse possession as a defence. Upon the trial before a jury a verdict was rendered in favor of the defendants, upon which judgment was entered, and an appeal taken to the Court of Appeals of

the District of Columbia, where the judgment was in all things affirmed, 5 D. C. App. 397, and the plaintiff has brought the record here for review.

It appeared on the trial that the record title to the lot had been, at the time of his death, in one David A. Hall, who died December 24, 1870, and the heirs-at-law of Hall, by divers conveyances, conveyed this lot to the plaintiff in fee. The plaintiff proved also that the defendants at the commencement of this action were in possession of the premises through one Richard Rothwell, their tenant, and that they claimed to own the same as heirs-at-law of William Douglas, who died in September, 1865. The defendants, on their part, proved a deed of conveyance to William Douglas of the lot in question from the corporation of the city of Washington, the deed reciting a sale of the property for unpaid taxes assessed on the land in the name of David A. Hall, the deed being dated July 6, 1865, and recorded July 12, 1865, in the proper office. The deed was admitted in evidence to show color of title in the defendants.

The facts upon which the defence of adverse possession arises have been so well summarized in the opinion of the Court of Appeals, which was delivered by Mr. Justice Morris, that we take his statement thereof, as follows:

"It was testified on behalf of the defendants that, some time in the latter part of the same year, 1865, one Richard Rothwell, a stonecutter and builder, who owned and occupied an adjoining lot, deposited upon the rear of the lot in controversy some pontoons which he had purchased from the United States, and which he stored there until he could make some disposition of them; and that he afterwards used a part of this lot for the deposit of stone and marble which he used in his business. He testified that he had deposited three or four wagon loads of marble there as early as the year 1867, and that some of the pontoons remained on the lot four or five years. He also testified that, in the year 1870, he commenced to deposit stone there in large quantities; and that in 1872 he erected a small shed on the lot in which to carry on his work, and which he replaced with a larger structure in or about the year 1882.

"Some time in the year 1867, Mrs. Douglas, the widow of William Douglas, apparently acting on behalf of his estate or of the estate of their children, had an interview with Rothwell and came to an understanding with him with reference to his continued occupancy of the lot, in pursuance of which understanding he agreed to pay as rent to her annually therefor a sum of money equal to the amount of taxes that should annually be assessed upon it, and he did so pay rent to her until her death in 1887; and after her death he paid the rent to her daughter, a Mrs. Wirt, down to about the time of the institution of this suit. During all this time, that is, from 1867 to 1889, Rothwell continued to occupy the property and paid rent therefor to the Douglases, and the latter paid the taxes annually for all the years from 1868 to 1893, both inclusive, except for the year 1870, during which there was an interregnum in consequence of the establishment about that time of a territorial form of government in the District of Columbia, the assessment of the property having been in the name of William Douglas since the year 1868, inclusive.

"By a stipulation filed in the cause since the argument, in order to supplement some omission in the printed record, it appears that, at the death of William Douglas in 1865, four of his children were adults and two minors; and that Mrs. Douglas, the widow, was appointed guardian to the two latter, and filed in her guardianship accounts for several years the annual receipts for taxes on this lot, paid by her, and was allowed credit for them by the court. It, therefore, appears that, with reference to this lot, she acted not for herself or on her own individual account, but on behalf of the estate that was then in her children.

"There was a proposition on the part of Mrs. Douglas, apparently about the time of Rothwell's attornment to her, to inclose the lot with a fence. But to this Rothwell objected, on the ground that it would interfere with his use of it and with free access to it of his horses and wagons; and the project was abandoned, so that the lot was never actually inclosed, and the only evidences of occupation consisted in such use of the property as has been indicated. The streets

had not been actually laid out in that neighborhood otherwise than by their delineation on the map of the city; and the whole region was an open field with no definite landmarks to indicate to the casual observer the actual location of this lot."

This action was commenced on the 31st of May, 1889, and, as stated in the brief of the counsel for the plaintiff, the vital question for the jury was, were the defendants in adverse possession prior to May 31, 1869. The evidence is uncontradicted that from a period as early as 1867 the defendants, through their tenant, Rothwell, were in possession of the premises, and such possession was continued up to the commencement of this action; but it is claimed that because Rothwell had entered upon the land in 1865, without claiming to own the same or to be entitled to possession, and had deposited the pontoons and marble mentioned in the foregoing statement of facts, that he thereby became a tenant of the plaintiff's predecessors in title, and that he could not change the character of his possession, as being in subordination to them, by any agreement between himself and Mrs. Douglas without giving notice to them that such an agreement had been made.

The doctrine which the plaintiff seeks to set up, we think, is not applicable to the facts of this case. After the purchase at the tax sale, the delivery of the deed and the recording thereof, Mrs. Douglas in 1867 claimed title to the land and demanded possession thereof from Rothwell, and by reason of the understanding then arrived at between herself and Rothwell he became the tenant of Mrs. Douglas as the representative of the heirs-at-law of William Douglas, and such tenancy continued up to the commencement of this action. She went to him under a claim of ownership and of the right to immediate possession of the lot as owner. He then acknowledged her right, became her tenant and paid rent to her. That certainly placed Mrs. Douglas, as the representative of the heirs, in possession of the lot. From that time the facts are sufficient upon which to base a claim of adverse possession. We think it was inaugurated when Rothwell,

under his agreement with Mrs. Douglas, acknowledged her right and paid her rent, and it was immaterial, so far as the heirs are concerned, that Rothwell had before that time entered upon the lot, although under no claim of title and presumably in subordination to the title of plaintiff's predecessors. *Harvey* v. *Tyler*, 2 Wall. 328. If Rothwell were himself asserting a title by adverse possession, while coming into possession in acknowledgment of and under the title of the owners, there might be an opportunity for the application of the doctrine contended for by plaintiff, and in such case Rothwell could not set up title by adverse possession while entering in subordination to the title of the owner, unless he first vacated and then retook possession as a hostile entry, or did some act necessarily evincing an intention to put an end to his tenancy. We are not dealing with Rothwell's rights or title. The defendants did all they were called upon to do in order to take possession and inaugurate an adverse holding, when they came with their tax deed, claimed to own the property described in it and exercised an act of ownership by letting the lot to Rothwell as a tenant at a certain rent. When Rothwell recognized the claim of ownership and remained in possession from that time in subordination to the rights of Mrs. Douglas and the heirs-at-law, their adverse possession, so far as this point is concerned, was sufficiently inaugurated. Mrs. Douglas was no party or privy to the prior entry of Rothwell, and, therefore, whatever the circumstances as proven in this case regarding such prior entry, her rights and those of the heirs cannot be in any way affected thereby. There is no pretence of any fraud or concealment in the case by any one, certainly not by Mrs. Douglas. Neither she nor the heirs were bound, in order to maintain their rights, to give any written or verbal notice to the former owners that they were in possession through Rothwell; nor did the possession of Rothwell, as tenant of the Douglas heirs, fail to commence at the time of this agreement because he did not give notice to the former owners of his recognition of the title and right to the possession as claimed by Mrs. Douglas.

We are also of the opinion that there was evidence to be

submitted to the jury, that the possession of the defendants was in all other respects adverse within the meaning of the law upon the subject for more than twenty years before the commencement of this action. There is no doubt that the entry of defendants by means of the agreement mentioned was under a claim of title on the part of Mrs. Douglas and those whom she represented as the heirs-at-law of William Douglas. There was enough to authorize the jury to find that the possession was notorious and exclusive, continuous, actual, open and adverse. *Ward* v. *Cochran*, 150 U. S. 597.

Payment of the taxes, as described in the above statement of facts, is very important and strong evidence of a claim of title; and the failure of the plaintiffs' predecessors to make any claim to the lot or to pay the taxes themselves, is some evidence of an abandonment of any right in or claim to the property. In *Ewing* v. *Burnet*, 11 Pet. 41, it was held by this court that the payment of taxes on land for twenty-four successive years by the party in possession was powerful evidence of the claim of right to the whole lot upon which the taxes were paid. The same principle is held in *Fletcher* v. *Fuller*, 120 U. S. 534, 552. It is some evidence that the possession was under a claim of right and was adverse.

Although there was no fence around this lot during the period in question, yet it was occupied by the tenant for the purposes of his business, that of marble and stone cutting, and although every foot of the property was not covered by his material, yet it was placed upon the lot in a convenient manner to be used by him in the prosecution of his business, and in a manner which showed that his possession was not in connection with any others, but was exclusive and perfect in himself.

We agree with the court below when, speaking through Mr. Justice Morris, it says that: "Short of an actual inclosure, it is not easy to conceive of a use and occupation more sharply distinctive and adverse than the conversion of the property into a stone yard, with the stone practically scattered all over it, according to the testimony of one or more of the witnesses. Nor should the fact be ignored in this connection that for

upwards of twenty years the record owners of this property wholly neglected their duties to the public in regard to it, never sought to pay the taxes, and permitted the defendants to discharge the burden which it was incumbent upon themselves to bear, and it might well be supposed that they had abandoned the property and acquiesced in the title which the defendants had acquired."

At the request of the plaintiff, the judge charged the jury that, "to defeat the claim of the plaintiffs in this action upon the defence of adverse possession, the jury must find from the evidence that the defendants, in person or by their tenants, have for more than twenty years prior to the 31st day of May, 1889, held actual, exclusive, continuous, open, notorious and adverse possession of the said premises, and they cannot extend their possession by tacking it to the prior possession of any person who, during such prior possession, did not claim any title or right to the premises." *Ward* v. *Cochran*, 150 U. S. 597.

This charge contains a statement of all the requisites for constituting an adverse possession according to the above-cited case.

And the jury were instructed that the defence of adverse possession was an affirmative one, and that it was incumbent upon the defendants to establish it by a clear preponderance of proof, and if the proof were equally balanced, they must find for the plaintiff.

At the request of the defendants the court gave the following instructions to the jury:

"If the jury find from the evidence that William Douglas, the ancestor of the defendants, bought at a tax sale held by the late corporation of Washington, so called, the property in controversy in this case and paid the price bid by him at such sale and received from the corporation of Washington a deed to said property, which was by him duly filed for record and recorded in the land records of the District of Columbia more than twenty years prior to the commencement of this suit; that thereupon the said property was assessed to the said William Douglas on the tax books of the city of Washington

and the taxes thereon from that time until the beginning of this suit paid by the said William Douglas or his successors in title, the defendants in this case; that at a period of time more than twenty years before the commencement of this suit the said property was rented on behalf of the defendants to a person who took the same and held possession thereof as tenant of the defendants for the purposes of a stone yard, paying rent therefor from the date of making such arrangement with the defendants, and that, although the said property was not inclosed by a fence, yet the person so renting the same, either upon the whole or a part thereof, during his occupancy, deposited stone used by him in his business, and that such use and possession of the said property was continued by the occupant thereof actually, exclusively, continuously, openly, notoriously, adversely and uninterruptedly for a period of twenty years next before the commencement of this suit, then the jury is instructed that the defendants are entitled to recover."

The plaintiffs excepted to the granting of such request and to the charge as given. For the reasons already suggested, we think the exception not well founded. The charge as given was substantially correct, and there was evidence in the case upon which to found it. The first, second and third requests to charge, made by counsel for plaintiffs, involve the questions above discussed, and were properly refused. There are no other questions of sufficient doubt to render their discussion necessary. We are of opinion there is no error in the record, and the judgment must be

Affirmed.